

### Criteria for Reviewing MOAs for Possible Revision (First Cycle)

Clean Water Act sections 304(i) and 402, along with implementing regulations in 40 CFR Part 123, contain NPDES state program requirements. One element used to establish the relationship between EPA and the state is a memorandum of agreement (MOA).

EPA currently reviews state NPDES programs via two separate review efforts: the State Review Framework (SRF) and the Permit Quality Review (PQR). These program reviews are led by the Office of Enforcement and Compliance Assurance (OECA) and the Office of Wastewater Management (OWM), respectively. These reviews will be integrated and will occur at least once every four years, as provided by the October 15, 2009 Clean Water Act Action Plan (as revised). The NPDES MOA review is intended to be done concurrently with the integrated review process. The problematic MOAs identified during the first four-year cycle should be updated by September 2017. The update may be an amendment to existing MOAs or, if necessary, a complete revision of existing MOAs, to address specific problematic issues; if an amendment is used, it is important to clarify which portions are being revised. MOA reviews should inform performance reviews and MOA fixes may need to be included in program findings and recommendations.

Based on the review, any MOAs which may omit necessary NPDES program provisions, or contain provisions that pose legal or practical barriers to program implementation, will be identified. MOAs that fail to reflect these key elements or that contain such barriers may be problematic in that such MOAs may prohibit the effective implementation of the state's NPDES program performance. For each of these MOAs, EPA anticipates engaging the state in a process to revise the MOA, as necessary. In general, the criteria<sup>1</sup> for identifying MOAs that may need revision includes those for which there are other than “yes” answers to these five criteria:

- The MOA meets the requirements of 40 C.F.R. §123.24;
- The MOA is consistent with the regulations and statute;
- The MOA accurately documents program authorities or jurisdictions that are all still supported by state law or policy;
- The MOA includes all critical sections and program components that reflect the federal requirements for both permitting and enforcement programs and that are within the scope of the approved program ; or
- The MOA does not limit EPA authorities to review NPDES permits, conduct compliance monitoring or investigations, initiate enforcement, or issue permits in an inappropriate manner.

As described in the “Note to Users” Section of the model MOA, there is some flexibility in terms of how the required elements are described, but the MOA should address these five

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<sup>1</sup> The criteria, as listed, are not in a priority order.

criteria in some way to comply with the CWA and implementing regulatory requirements and to ensure that the MOA serves as an effective tool for coordination. Required elements must be documented in writing and set forth in a permanent document that is effective until modified. In addition, if a state is missing a required element of the NPDES program (storm water, pesticides, concentrated animal feeding operations, pretreatment, mining), EPA should work with the state to address the deficiency and may include it in other documents, as appropriate, in addition to referencing it in the MOA.

40 CFR §123.24 sets forth required elements of MOAs between states authorized to administer the NPDES program and EPA, as further explained in the 1986 NPDES State Program Guidance. As a preliminary matter, in order for an MOA to be effective, it must be signed by the Director of the state agency and the appropriate EPA Regional Administrator. The MOA, annual state grant work plan, and state/EPA Enforcement Agreement (if separate from the MOA) should all be consistent. The main body of the MOA must consist of a listing of the responsibilities and procedures that will be used to ensure the coordination and cooperation between the state and EPA. Additionally, consistent with the requirements in 40 C.F.R. §123.62, the MOA should reflect any program revisions and/or changes in the state's legal authority that have occurred since the MOA was first put into place.